INDEX

	PAGE
OPINIONS BELOW	1
QUESTION PRESENTED	1
STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT	5
POINT I—The Court of Appeals Correctly Ruled that There Was No Fault on the Part of the Shipowner and that, Consequently, It Was Not Liable Under the Jones Act	5
POINT II—The Decision of the Court of Appeals Involves No Conflict with the Decisions of Any Other Court	9
CONCLUSION	9

CASES

Berti v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397 (C. A. 2)	6
Boudoin v. *Lykes Bros. Steamship Co., Inc.*, 348 U. S. 336, 339, 340	6
Carlisle Packing Co. v. *Sandanger*, 259 U. S. 255	6

POINT II

THE DECISION OF THE COURT OF APPEALS INVOLVES NO CONFLICT WITH THE DECISIONS OF ANY OTHER COURT.

The holding of the Court of Appeals that under the Jones Act there is no liability without fault is in accordance with express provisions of the pertinent statutes. There is no case which holds to the contrary.

Here there was no evidence of any breach of duty or of any defective appliances. On the contrary, petitioner was furnished with the usual and customary tools of the trade which were in good order and condition. The sole cause of the accident was the rash and imprudent action of petitioner himself in picking up a sharp knife and then using it in a manner for which a knife was never intended. To expect respondent's agents or servants to foresee anyone using such a tool, which petitioner admits was improper, and to use it in such a manner, is to argue an omniscience quite superhuman.

There was no evidence upon which the jury could properly find a verdict for petitioner.

The Court of Appeals was clearly correct in ruling that respondent's motion for a directed verdict should have been granted.

Conclusion

For the foregoing reasons, it is respectfully submitted that Petition for Writ of Certiorari should be denied.

WILBUR E. DOW, JR., ESQ.
FREDERICK FISH, ESQ.
Counsel for Respondent

PAGE

De Zon v. *American President Lines, Ltd.*, 318 U. S. 660 5

Doucette v. *Vincent*, 194 F. 2d 834 (C. A. 1) 6

Jacob v. *City of New York*, 315 U. S. 752 ..... 6, 7, 8

Jamison v. *Encarnacion*, 281 U. S. 635 ..... 5, 8

Lake v. *Standard Fruit and Steamship Co.*, 185 F. 2d 354 (C. A. 2) 6

Mahnich v. *Southern S. S. Co.*, 321 U. S. 96 6

Manhat v. *United States*, 220 F. 2d 143, 147 (C. A. 2) 7

Pacific American Fisheries v. *Hoof*, 291 Fed. 306 (C. A. 9) 6

Socony-Vacuum Oil Co. v. *Smith*, 305 U. S. 424 6

The Osceola, 189 U. S. 158 6

STATUTES

Federal Employer's Liability Act, 35 Stat. 65, 45 U. S. C. 51 2

Jones Act, 41 Stat. 1007, 46 U. S. C. 688 ..... 2, 5, 6, 7, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

HENRY FERGUSON, *Petitioner,* v. MOORE-McCORMACK LINES, INC., *Respondent.*	No. 831

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

No opinion was rendered in the District Court.

The opinion of the Court of Appeals for the Second Circuit (Appendix to Petition, p. 15) is reported at 228 F. 2d 891.

Question Presented

The real question presented is whether the Court of Appeals was correct in holding a shipowner not responsible for cuts sustained by a ship's baker on the grounds that it was not within the realm of reasonable forseeability that the baker, who had been supplied with a usual ice cream scoop in good condition, for use in serving ice cream, would use a razor-sharp butcher's knife, without a guard, as a dagger to stab ice cream which he had found to be hard.

Statutes Involved

This action is brought under the Jones Act, 41 Stat. 1007, 46 U. S. C. 688, which incorporates the Federal Employer's Liability Act, 35 Stat. 65, 45 U. S. C. 51.

The Jones Act provides, 41 Stat. 1007, 46 U. S. C. 688, in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ."

The Federal Employer's Liability Act provides, 35 Stat. 65, 45 U. S. C. 51, in part as follows:

> "Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Statement

The testimony of petitioner was that, on March 27, 1950, between 8 p. m. and 8:40 p. m. when the accident occurred, he was engaged in serving ice cream in the vessel's galley on C deck out of a 2½ gallon container

(D. App. 16, 20).* Prior to the accident petitioner had served a half-used tub and half of another tub of ice cream using a standard ice cream scoop which shaped the dessert into a ball (D. App. 20-22). It is undisputed that this scoop was the usual implement furnished for serving ice cream ashore or afloat and that it was in good condition (D. App. 79). When over half-way down the second container, petitioner found the ice cream to be harder towards the center and bottom of the tub and difficult to scoop out. Petitioner then picked up a razor-sharp butcher knife, eighteen inches long, kept under a grill nearby, which he knew was used for cutting French bread, and proceeded to loosen the ice cream by holding the knife in his fist, sharp edge outside, stabbing and pounding at the ice cream (D. App. 23). This knife had no guard between the handle and the blade similar to the flange or guard found on a French knife (D. App. 61). Petitioner knew it was improper to use a butcher knife in this manner (D. App. 61). The knife itself was in good condition. Petitioner testified that on one jab the point of the knife hit an extra-hard bit of ice cream and the jolt caused his hand to slip down from the handle of the knife on to the blade, badly cutting his third, fourth and fifth fingers (D. App. 16, 17).

It is claimed that the ice cream was not properly softened because of defects in the refrigerating machinery or because the storage chest was too cold. There was, however, no testimony to this effect and there was no testimony that there was any trouble whatever with any of the machinery or with the dispensing chest on the day in question (see, D. App. 29). Testimony of petitioner merely tended to

*Numerals following the letters "D. App." in parentheses refer to pages in defendant-appellant's appendix in the Court of Appeals which has been filed here.

for failure to provide a safe place to work because of a faulty appliance or a structural defect of the vessel. *Pacific American Fisheries* v. *Hoof*, 291 Fed. 306 (C. A. 9) (fastenings of ladder missing); *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255 (gasoline in coal oil can); *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96 (defective rope used in rigging staging); *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (defective step); *Jacob* v. *City of New York*, 315 U. S. 752 (worn and defective wrench).

While there may be liability without fault under the doctrine of unseaworthiness for injuries caused by defective appliances, *The Osceola*, 189 U. S. 158, no case has been cited by petitioner which holds that liability may be imposed under the Jones Act without proof of negligence. There is no case which so holds. Cases holding that under the Jones Act there is a non-delegable duty to provide a safe place to work go no further than to hold the shipowner responsible for the negligence of a person to whom the duty, in fact, has been entrusted.

Even under the doctrine of unseaworthiness, the Court has recently held that "warranty of seaworthiness does not mean that the ship can weather all storms" but only that it be "reasonably fit" for the purpose at hand and that "the problem (of unseaworthiness) as with many aspects of the law, is one of degree". *Boudoin* v. *Lykes Bros. Steamship Co., Inc.*, 348 U. S. 336, 339, 340. Accordingly, the shipowner has never been held obligated to provide an accident-proof ship, *Lake* v. *Standard Fruit and Steamship Co.*, 185 F. 2d 354 (C. A. 2), but only to furnish reasonably safe or adequate tools and working conditions. *Doucette* v. *Vincent*, 194 F. 2d 834 (C. A. 1); *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397 (C. A. 2); cf. *Jacob* v. *City of New York*, 315 U. S. 752, 758, where the

Court said "Respondent's duty was not to supply the best tools, but only tools which were reasonably safe and suitable". In the *Jacob* case, a seaman was injured due to the slipping of a worn and defective wrench, the seaman previously having made repeated requests for a replacement of the wrench.

In the present case, there was no evidence whatever of unseaworthiness, and it was, of course, for this reason that petitioner's experienced counsel founded his claim solely on the provisions of the Jones Act.

Petitioner contends further that the common law doctrine of "reasonable foreseeability" of harm may not be applied in a Jones Act case (Pet. 6). It should be noted that the present case does not involve an injury directly resulting from a defective appliance. Any mal-function of the ice cream serving chest could only have resulted in soft, not hard, ice cream. The ice cream scoop that was provided and the knife that was used were both in good condition. As there was no direct connection between the usual appliances which were furnished by respondent and the accident, the question of determination of negligence, therefore, became one of whether there was any reasonable apprehension of danger by reason of the hardness of the ice cream, even assuming that it could have been found that respondent should have known of the hard condition (and there was no evidence in this case to support such conclusion). *Manhat* v. *United States,* 220 F. 2d 143, 147 (C. A. 2), certiorari denied, 349 U. S. 966. In the *Manhat* case, a ship at a pier was undergoing repairs. A lifeboat had been swung outboard on davits but was unsecured other than by falls. Plaintiff, at work in the boat with others, was injured when the boat fell to the pier. This must have been caused by the activation of the releasing

gear, which itself was in good condition, by plaintiff's fellow workman. It was claimed that the shipowner was negligent in that a dangerous situation was created when the boat was swung out without special extra lashings. As to this, the Court said:

> ". . . the prospect of the falling of a lifeboat under the circumstances presented here did not possess those elements of reasonable foreseeability which would impel the conclusion that reliance upon the Rottmer-type releasing gear constituted a failure to exercise that degree of care which could be expected of a reasonable man."

The significance of foreseeability and the necessity of apprehension of danger as a necessary element in determining the degree of care which may be expected of a reasonable man has been recognized by this Court in other cases involving maritime injuries. *Jacob* v. *City of New York*, 315 U. S. 752; *Jamison* v. *Encarnacion*, 281 U. S. 635.

Finally, petitioner has argued that the Court of Appeals has applied the defense of assumption of risk, which is no longer available in seamen's cases. This argument is wholly without merit, for the problem of affirmative defense does not arise until liability for negligence has been established. The opinion of the Court of Appeals makes it perfectly clear that petitioner has failed because there was "no proof of fault on the part of the shipowner" (Pet. 16).